5. MEDICAL LEAVE

- *Basic Rights*
- *Serious Health Condition*
- *Intermittent Leave*
- *Reduced Schedule*
- *Alternative Position*
- *Certification*
- *Recertification*
- *Appointments*

ILLNESSES AND INJURIES ACCOUNT for approximately two-thirds of FMLA requests. The Act has saved many employees who might otherwise have faced severe discipline or termination.

BASIC RIGHTS

An eligible employee may take up to 12 workweeks of FMLA medical leave on a continuous, intermittent, or reduced-schedule basis.

During leave, the employer must continue paying for group health plan benefits. Upon recovery, the employee must be restored to his or her original job or its equivalent.

An employer may not warn, suspend, fire, or deny advancement because of FMLA absences. Nor may it count the time under an attendance control policy.

SERIOUS HEALTH CONDITION

An employee is entitled to FMLA medical leave if he or she is unable to work because of a serious health condition. The FMLA defines a serious health condition as an illness, injury, impairment, or condition — physical or mental — that involves one or more of the following:

- An overnight stay in a hospital
- A period of incapacity of more than three consecutive calendar days plus continuing medical treatment
- Incapacity due to a chronic condition
- Incapacity due to pregnancy
- Long-term or permanent incapacity

- Absences for multiple treatments for a condition that if left untreated would result in more than three consecutive days of incapacity

Inpatient care. An ailment that requires an overnight stay in a hospital or residential care facility is a serious health condition. FMLA coverage applies to the time in the hospital and any related periods of incapacity. Day surgery or treatment in an emergency room is not qualifying in itself.

Absence plus treatment. An injury, illness, or other medical condition qualifies as serious if it:

- Incapacitates an employee for more than three consecutive calendar days; and
- Involves continuing medical treatment.

Incapacity. A condition incapacitates an employee on a scheduled workday if the employee is unable to work at all, or unable to perform an essential function of his or her regular position. Examples are a truck driver who cannot drive, or a laborer who cannot lift. The ability to perform other jobs, light duty, or modified work is irrelevant. A condition incapacitates an employee on a non-scheduled workday, such as a Sunday or a holiday, if the employee is unable to perform a routine daily activity such as driving, performing housework, or shopping.[21]

According to judicial interpretation, on at least three consecutive days the condition must incapacitate the employee for the entire day. The fourth consecutive day can be partial.[22] An employee whose incapacity begins at noon Thursday and persists Friday, Saturday, and Sunday, meets the more-than-three-consecutive-days requirement. Incapacity on four separate days is not qualifying.

> **Note:** If a health condition is serious, any absence it causes qualifies for FMLA protection, even if the absence is as short as a day or part of a day. Absences for medical treatment are included.

Continuing treatment. To meet the test of continuing treatment, a health care provider, or a therapist or nurse referred by a provider, must treat the employee on two occasions or on a single occasion followed by a supervised regimen of continuing treatment.[23] Treatments include examinations to decide if a serious health condition exists, evaluations of the condition, and measures to resolve or alleviate the condition. A telephone conversation is not a treatment.

Regimen of continuing treatment. Supervised regimens of continuing treatment include a course of prescription medication — for example, an antibiotic — or therapy involving special equipment. Over-the-counter remedies, exercise, and rest are not included.

Example: Harold Monks developed a skin infection and could not work for five days. He saw a physician who prescribed an antibiotic. Because his care includes a regimen of continuing treatment, his absence qualifies under the FMLA.

Non-qualifying condition. Ailments such as the common cold, the flu, and upset stomachs generally do not qualify as FMLA because they are not incapacitating for more than three days and do not require continuing medical treatment. Nor do tooth extractions, ear infections, eczema, hay fever, gum disease, bronchitis, minor ulcers, poison ivy, sinusitis, or food poisoning.

Note: A minor ailment such as the flu or a tooth extraction can evolve into a serious condition if complications develop that extend incapacity and require continuing medical care.[24]

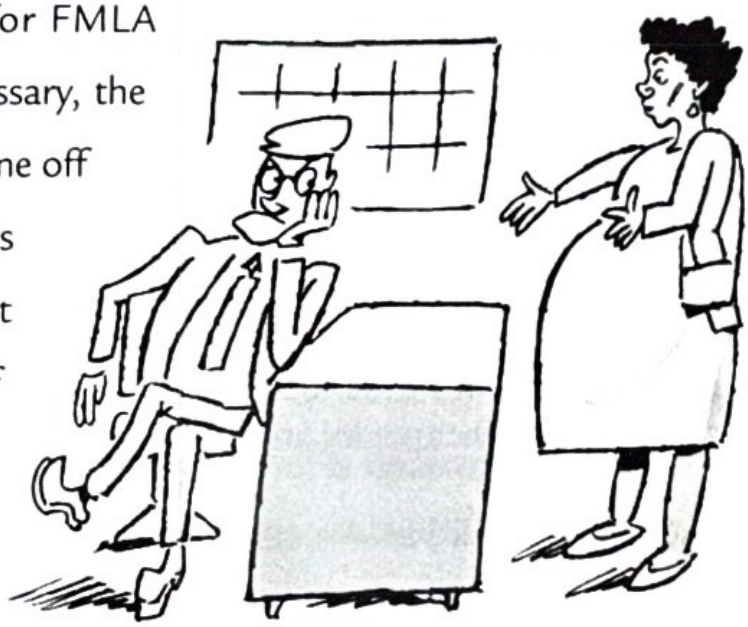
Chronic condition. An absence due to a chronic condition qualifies for FMLA protection. A condition is chronic if it:

- Continues over an extended period, and
- Requires periodic visits for treatment by a health care provider, or a nurse or physician's assistant under direct supervision from a health care provider, and
- Causes or may cause episodic periods of incapacity.[25]

Chronic conditions include diabetes, asthma, heart disease, arthritis, cancer, colitis, clinical depression, severe migraine headaches, multiple sclerosis, and lingering orthopedic injuries. A

worker who is unable to work because of a chronic condition may take leave for a day or a part of a day. Medical treatment is not necessary during the absence.[26]

Pregnancy. An employee unable to work because of a pregnancy-related condition, including recovery from childbirth, miscarriage, or abortion, qualifies for FMLA leave. If medically necessary, the employer must allow time off on an intermittent basis – for example, recurrent absences because of severe morning sickness. Medical treatment is not necessary during each absence, although the pregnancy itself must be under the supervision of a health care provider.



Long-term or permanent incapacity. A disorder that causes long-term or permanent incapacity is an FMLA condition. The employee must be under the care or supervision of a health care provider.

Multiple treatments. A condition qualifies for FMLA leave if an employee must be absent for a series of medical treatments to

forestall a disorder that could cause more than three consecutive days of incapacity. An example would be radiation treatments to prevent the spread of cancer. Multiple treatments for restorative surgery after an injury also qualify.

INTERMITTENT LEAVE

For many workers, the most valuable FMLA benefit is intermittent leave. Intermittent leave is medically necessary leave taken recurrently for the same condition. An employee who suffers from a chronic ailment — diabetes, asthma, a severe back problem — may need intermittent leave throughout the year.

> **Example:** Steve Linsky has not been right since his back operation. Temperature changes, stress, and awkward movements cause his spine to lock up. In 2006, he missed four days in January, a week in February, two-and-a-half days in March, four days in May, one day in June, six days in September, half a day in October, five days in November, and three days in December. Since his total leave time was less than 12 workweeks, his employer could not fire or discipline him.

Other examples of intermittent leave include chemotherapy on alternate weeks, going home early because of migraine headaches, or not working regular overtime because of a neck problem.

Counting time. An employee who needs leave intermittently can compute her entitlement by multiplying the number of days in her

regular workweek times 12. An employee who works Monday through Friday is entitled to 60 FMLA days; a worker scheduled Monday through Saturday is entitled to 72.

> **Note:** Voluntary overtime does not change an employee's regular workweek. An employee whose normal schedule is five days a week, but who averages six days because of voluntary overtime, is entitled to 60 FMLA days a year, not 72.

Docking salaried employees. An employer may dock a salaried employee for FMLA time without affecting the employee's exempt status under the federal overtime law.[27]

REDUCED SCHEDULE

The FMLA requires employers to adjust the schedules of employees who, because of serious health conditions, need to reduce their regular hours per week or day. A worker who undergoes an operation may need a 24-hour per week schedule. A pregnant employee may only be able to work four hours per day. A warehouse worker with a chronic condition may be unable to work mandatory overtime.

An employer cannot refuse a reduced schedule because it has a policy against part-time work, because a limited workweek is inefficient or disruptive, or because the union contract forbids less than full-time work. The maximum leave period can be computed by dividing 12 by the proportion of the normal week not worked.

For example, a half-time schedule must be permitted for 24 weeks (12 divided by .5); a two-fifths schedule for 20 weeks (12 divided by .6). Wage rates and benefits must be continued even if normally not available to part-time workers.

ALTERNATIVE POSITION

When an employee needs intermittent leave or a reduced schedule because of planned medical treatment or to recover from a serious health condition, the employer can temporarily alter the employee's job or transfer the worker to a position that better accommodates recurring time off.[28] The new position must have equivalent pay and benefits (rates can be raised for this purpose) and may not pose a hardship for the employee, such as a new shift or longer commuting time. When the need for time off is over, the employer must allow the employee to return to his or her regular position.

> **Example:** Josh Papir, a cable installer, needs medical treatments three days a week for a month. His employer can transfer him to a job in the parts department. When his treatments end, he must be reinstated to his regular job.

Illegal transfer. An employer may not transfer an employee in violation of the union contract. Nor may it effectuate a transfer to punish an employee or to discourage the taking of FMLA leave.

CERTIFICATION

An employer can ask a worker who requests medical leave, or who misses time for a medical reason, to provide a certification from the employee's health care provider.[29] The following rules apply:

- The employer is expected to make its request when the employee gives notice of a need for time off, or within two days thereafter, or, in the case of unforeseen leave, within two days after the leave commences. After two days, an employer may require certification if it has a legitimate basis to question the leave or its duration.[30]
- If a sick pay plan applies to an absence, and the plan requires less information than is required under the FMLA, the employer cannot require the employee to submit an FMLA certification.[31]
- The employer must make its request in writing directly to the employee.[32] Absent a direct request, an employee does not have to furnish documentation. A posted or handbook policy is not sufficient.[33]

  Exception: The FMLA excuses an employer from putting a certification request in writing if it has issued the employee an FMLA "rights-and-responsibilities" notice following an absence within the previous six months and if the notice

clearly explained that a medical certification would be necessary for future leaves of a particular nature or duration. The employer must also include the policy in its benefit documents. Even under these facts, the employer must give verbal notice that it requires certification.[34]

- The request must describe the anticipated consequences if the employee fails to comply or if the certification is inadequate.[35]
- The employer must allow the employee at least 15 calendar days to respond to the certification request. The employer must grant a request for an extension if the provider is on vacation or if other particular circumstances (other than physician or clerical laziness) justify the request.[36] While awaiting the form, the employer is expected to grant FMLA status on a provisional basis.[37]
- The employer can insist on an FMLA certification form, either the model form created by the U.S. Department of Labor (see Appendix D) or another asking for the same information.[38] The DOL form asks the provider to indicate which part of the definition of a "serious health condition" applies to the employee's condition, the medical facts which support the certification, the approximate date the condition commenced, the probable duration, and whether the employee is unable to perform work of any kind or is unable to perform

an essential job duty. If the employee will need time off on an intermittent basis, the provider should give a schedule of medical treatments, an estimate of the number of occurrences and their likely duration, or explain that leave will be needed on a sporadic basis.

- The certification form cannot ask the provider to provide a diagnosis or to attach records.[39]

  Note: A sick or disability pay plan that requires documentation beyond what can be sought under the FMLA may cover the absence. In that case, the employee can choose either to comply with the plan, take unpaid FMLA leave, or substitute other available paid leave.[40]

- The employer can attach information to the certification form, such as a record of the employee's absences or a list of essential job functions.[41]
- The employee is responsible for any fees charged by the health care provider to prepare the certification.
- If the certification is inconsistent or incomplete—for example, if the provider fails to estimate the duration of the leave—the employer must inform the employee of the deficiency and allow additional time to obtain a corrected form.[42] The employer does not have to warn the employee that the certification has not arrived by the deadline. Nor must it allow addi-

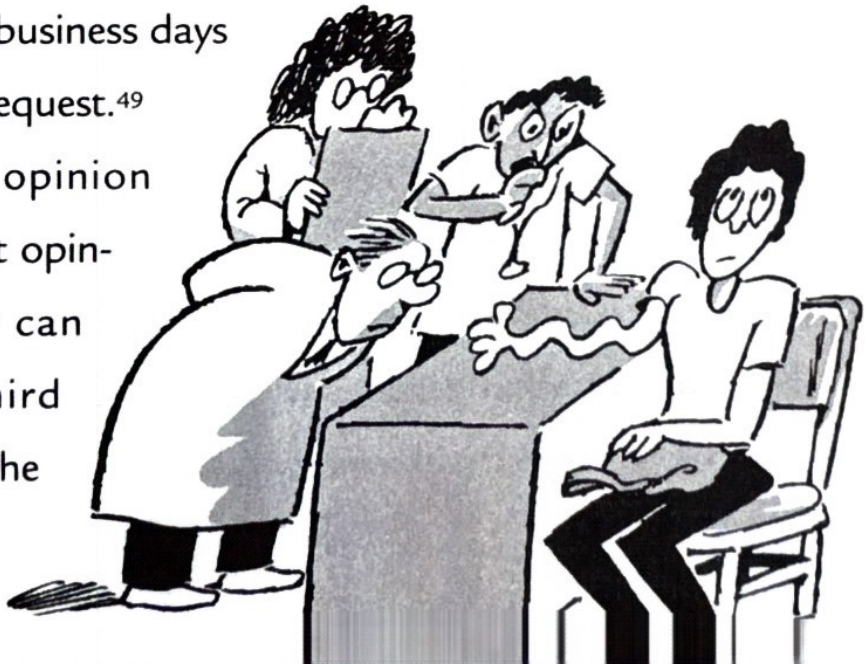
tional time if the provider denies that the employee is incapacitated or suffering from a serious health condition.

- The employer cannot directly contact the employee's health care provider to obtain information beyond the certification. But it can ask the employee to provide clarifying facts or to sign an authorization for a provider representing the employer to contact the employee's provider to authenticate or clarify the certification.[43] The employee should cooperate: a refusal to provide information may permit the employer to reject a leave request or even to charge the employee with insubordination.[44]
- The employer or the requesting supervisor must keep the certification and any clarifying information in a confidential medical file. Records may not be shown to other supervisors or managers unless the employee is seeking a job modification or other accommodation.[45]
- If the employee fails to provide a requested certification, or if the certification does not say that the employee is unable to work because of a serious health condition, the employer can disapprove a leave request, revoke a previous acceptance, count the employee's absences under an attendance plan, or discipline the employee for unexcused absences.

> **Note:** A court has ruled that if an employee learns that a provider has submitted a damaging certification, the employee can submit a certification from another provider. If the second certification arrives before the employer takes adverse action, and if it supports the employee's request for leave, the employer must accept it.[46]

Second opinion. An employer who has reason to doubt the validity of a medical certification can require, at its own expense, the opinion of a second health care provider of its choice.[47] The second provider may not be on the employer's payroll (for example, the company doctor) or perform services for the employer on a regular basis (for example, pre-employment physicals).[48] The opinion must be limited to the condition certified by the employee's medical provider. An examination may be scheduled anytime after receipt of the employee's certification. Pending receipt of the second opinion, the employee is provisionally entitled to FMLA protections, including health benefits. The employer must provide a copy of the second opinion within two business days of the employee's request.[49]

If the second opinion differs from the first opinion, the employer can commission a third provider to "break the



tie." The employee and the employer must jointly choose the identity of the third provider. FMLA protections continue.

If the third provider says that the employee's condition is not serious or disabling, the employer can disallow a leave or, if absences have occurred, take disciplinary action.[50]

Health care provider. Only a "health care provider" can issue an FMLA certification or provide a second opinion. Under the DOL regulations, this term includes:

- Physicians
- Optometrists
- Osteopaths
- Chiropractors, when manipulating the spine to correct a "subluxation" (incomplete dislocation demonstrated to exist by x-ray)
- Podiatrists
- Dentists
- Clinical psychologists
- Christian Science practitioners
- Nurse practitioners, nurse midwives, and clinical social workers (if authorized under state law to diagnose and treat serious health conditions without supervision)
- Other providers recognized by the employer or the employer's health plan as qualified to substantiate a claim for benefits[51]

Word to the Wise

You take a risk if you simply give your provider a blank certification and ask that it be sent to your employer. The provider may not answer all of the questions or may submit the form late. If the form does not arrive within the applicable time period, with no explanation from you, the employer can take adverse action. The safest practice is to pick up the form from the provider, make sure that it is complete (especially that a box is checked indicating a serious health condition), and deliver it personally to your employer.

RECERTIFICATION

An employer can ask a worker to recertify an FMLA condition. The employee is responsible for any expenses. To prevent abuse, the law imposes the following conditions:

- If the original FMLA certification is for a continuous leave with a minimum duration of more than 30 days, the employer may not request a recertification within the projected period unless:
  1. The employee requests an extension of leave, or
  2. Circumstances described by the original certification change significantly (the condition appears to have improved or the number of absences is greater than projected), or
  3. The employer receives information that casts doubt on the reason for absence.[52]

- If the original FMLA certification is for intermittent or reduced-schedule leave and projects a minimum period—for example, three months—the employer may not request a recertification during the projected period unless one of the three conditions listed above is met.[53] The time span must be specific. A certification that an employee will need leave "indefinitely" does not bar a recertification request.
- If the provider does not certify a minimum projected period of incapacity, the employer may require recertification no more often than every 30 days, and only in connection with an absence, unless one of the three circumstances listed above applies.[54]
- The employer must permit the employee at least 15 calendar days to provide a recertification. Additional time must be allowed if the health care provider is unavailable.[55]
- With the employee's permission, the employer can assign a provider of its choice to contact the employee's provider to clarify or authenticate the recertification.
- The employer may not challenge a recertification by means of a second or third medical opinion.

Note: An employer may reinitiate the medical certification process with the first absence in a new 12-month leave year and may demand a second and third provider's opinion as

appropriate. Under the rolling-backward leave-year method, the right to reinitiate the certification procedure resumes 12 months after the employee's first absence for the condition.[56]

APPOINTMENTS

A visit to obtain medical treatment for a serious health condition is considered a period of incapacity and an employee is entitled to time off. However, employees do not have an unlimited right to schedule appointments during work.[57] The following procedures apply:

- The employee must try to schedule the appointment outside of working hours.
- If an appointment during working hours is necessary, the employee must provide advance notice, 30 days if possible.
- If the employer contends that an appointment will be unduly disruptive, the employee must attempt to reschedule, subject to the approval of the health care provider.
- When a series of appointments is necessary during working hours, the employee must consult with the employer and attempt to agree on a time or a schedule that will not be unduly disruptive, subject to the approval of the health care provider.

An employee who has a medical appointment and can return to work does not have a right to take the entire day off. Conversely,

an employer may not force an employee to stay out of work for longer than is needed to attend the appointment and return.[58] The admonition, "If you can't come to work for the whole day, don't come at all," violates the FMLA.

The employer shall advise an employee whenever the employer finds a certification incomplete, and provide the employee a reasonable opportunity to cure any such deficiency.

— 29 CFR §825.305(d)

QUESTIONS AND ANSWERS

Allergy

Q. I missed work Tuesday because of an allergic reaction. Is my absence covered by the FMLA?

A. This depends. Since the reaction did not incapacitate you for more than three consecutive days, it does not qualify as a serious temporary condition. But if you have been receiving medical treatment for your condition over an extended period, your allergy may qualify as chronic. Employees who suffer from chronic disorders may miss work for a day or a part of a day.

Substance abuse

Q. Does the FMLA protect an alcoholic who is late to work because he was drinking the night before?

A. No. FMLA protection does not extend to absences or tardies caused by the use of alcohol or illegal drugs.[59]

Absence plus light duty

Q. Elbow tendonitis caused me to miss work for a day. When I returned, my supervisor transferred me to a light-duty position for five days while I underwent physical therapy under a doctor's supervision. Is my absence covered by the FMLA?

A. Yes. Your condition qualifies as serious because you were unable to perform the essential duties of your regular position for more than three consecutive days.

Incomplete certification

Q. Management denied me FMLA status because my doctor forgot to check off a box on the certification form stating the serious health condition category into which my illness falls. Otherwise, the certification was fine. Can I be fired because my doctor screwed up?

A. No. When a medical certification lacks sufficient information to verify FMLA status, an employer must explain the problem and allow the employee time to obtain a corrected form.[60]

Disability plan

Q. Our sick pay plan says employees must submit documentation for all medical absences. Is this superseded by the FMLA rule forbidding recertifications more frequently than 30 days?

A. No. The FMLA does not overrule disability insurance, sick pay, or workers' compensation requirements.

Company exam

Q. I have been approved for a 12-week medical leave. How often can the company make me see an outside doctor?

A. This depends. If your leave is unpaid, your employer is limited to a single second-opinion examination. If you are receiving pay under a disability insurance or workers' compensation program, however, the employer or the disability insurer may be able to conduct periodic examinations pursuant to the program's verification procedure.

Stress attack

Q. A psychiatrist is treating me for a nervous condition. Can I invoke the FMLA if I miss work because of anxiety triggered by supervisory abuse?

A. Yes, if your health care provider certifies that you are unable to work because of your disorder.

Lifetime certification?

Q. If a doctor certifies that an employee will need intermittent medical leave for the rest of his life, is the employer prevented from seeking further certifications?

A. No. A certification may be requested each new leave year.

Late certification

Q. Our company gives us 15 days to submit FMLA certifications. My doctor forgot to mail the form until the 16th day. Can the company deny FMLA leave or take other steps against me?

A. This depends on how quickly action is taken. An employer can deny a leave request or impose discipline if a certification does not arrive by a deadline but it cannot take action after a valid certification arrives.

More than 12 weeks

Q. My three-month leave for cancer treatment is almost at an end. I need four more months to get well. Does the company have to grant me an extension?

A. The FMLA limit is 12 weeks, but you may have additional rights under your contract. Many agreements guarantee that leaves of absence for legitimate medical reasons will not be unreasonably denied. Under such language, an employer can-

not deny an extension on the grounds that its obligation is limited to the FMLA period.[61]

Moreover, under a contract forbidding discrimination based on a physical handicap, as well as under the Americans with Disabilities Act (ADA), an employer has a duty to provide a reasonable accommodation to a worker with a significant disability.[62] Extending a leave for an employee who has good prospects of recovery is a reasonable accommodation.[63] If your employer denies your request, you can file a grievance, complain to the Equal Employment Opportunity Commission, or sue in court.

Fraud

Q. While a worker was on leave for a back problem, a private detective hired by the company observed him doing heavy lifting for three hours. Can the worker be fired?

A. Yes. An employer can terminate a worker who dishonestly requests FMLA leave.

Cosmetic surgery

Q. An employee is scheduled for surgery to remove acne scars. Does this come under the FMLA?

A. Probably not. Unless complications develop, cosmetic treatments usually do not qualify as serious health conditions.[64]

Release

Q. Can Labor Relations insist that I sign a release of medical records before approving my leave request?

A. This depends. If you are seeking unpaid FMLA leave the answer is no, as the employer may only request a certification. If you are seeking benefits under a paid disability plan, however, you must comply with the plan's requirements.[65]

Confidentiality

Q. I submitted a leave certification to the Medical Department due to a urinary tract problem. Can the medical director show it to my supervisor?

A. No. An FMLA certification is a confidential record. It cannot be shared with others unless the employee is seeking a work restriction or a job accommodation.[66]

Partial-day leave

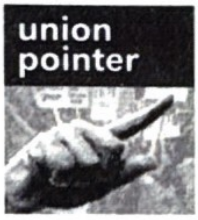
Q. I had to stop work two hours early when arthritis flared up. How is this counted under the FMLA?

A. If your normal workweek is 40 hours, a two-hour absence is 1/20 of a workweek.[67]

Partial-week leave

Q. I was incapacitated Thursday and Friday. How much time can the company subtract from my FMLA entitlement?

A. If your normal workweek is five days, two days is 2/5 of an FMLA week. If your workweek is six days, two days is 1/3.



Since our union learned its rights under the FMLA we have never lost a grievance related to an FMLA event. For example, our employer's attendance policy states that the employer can discipline an employee if he or she is absent for eight occurrences in the year. We had a situation where the employer sent a disciplinary letter to a member who used six sick days to care for an ill child, returned to work, and missed a day because of a cold. The steward immediately went to the supervisor's office and explained that the company cannot count the days the worker was out to care for his child. The member had only one occurrence, even though he used up all of his sick leave. Within a short time, the company rescinded the letter.

The company attendance policy says that a worker who achieves perfect attendance earns $500 for one year and an additional $2,500 for five consecutive years. When it came time to pay a member who had earned the five-year bonus, the employer refused, claiming that an absence for a job injury broke the perfect attendance chain. We took the case to arbitration and introduced the DOL regulations. The arbitrator ruled in our favor, and the member got his $2,500.

Whenever we have an FMLA case, we always threaten to sue for double damages and attorney's fees. This has helped to resolve many disputes.

Dave Robbins
Secretary-Treasurer/Business Agent
Teamsters Local 502
Boston, Massachusetts